Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

NEW PROCESS STEEL, LP, PETITIONER

v.

JOSEPH YOUNG, DARREL SIMS,
MARK STEVEN GREER, MORRIS PICKETT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the decision of the Eleventh Circuit conflicts with the clear language and legislative intent of Rule 7 of the Federal Rules of Appellate Procedure by requiring that the district court engage in a *Christiansburg Garment Co. v. Equal Employment Opportunity Comm'n*, 434 U.S. 412 (1978) (hereafter referred to as "*Christiansburg*") analysis before an appeal is filed and before attorneys' fees are included in a cost bond.

2. Whether the standard applied by district courts in **formulating an amount** for a bond under Rule 7 of the Federal Rules of Appellate Procedure should be the same standard as that used when deciding **whether to award** attorney's fees to a prevailing defendant in a Title VII action under the Civil Rights Act of 1964, as amended, (42 U.S.C. § 2000e-5(k)).

3. Whether the decision of the Eleventh Circuit violates a prevailing defendant's rights to due process and is contrary to Supreme Court precedent for the Court to require a district court to analyze the not-yet-filed appeal using the requirements set forth in *Christiansburg* before attorney's fees are included in the amount set for a bond under Rule 7 of the Federal Rules of Appellate Procedure.

4. Whether the decision of the Eleventh Circuit creates an impossibility, thus depriving the prevailing defendant of its rights to due process. Moreover, the Court of Appeal's failure to require the losing plaintiff to identify at least one meritorious point of appeal makes it impossible for the district court to make the necessary findings to include attorneys' fees in a bond order

pursuant to Rule 7 of the Federal Rules of Appellate Procedure.

5. Whether the decision of the Court of Appeals eliminates judicial economy and creates a regime whereby Civil Rights cases will require multiple appeals.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner New Process Steel, L.P. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit (App. 1a) is reported at 419 F.3d 1201 (11th Cir. 2005). The original opinion of the United States Court of Appeals for the Eleventh Circuit was withdrawn but is reprinted for the Court's convenience at App. 17a. The order denying the petition for rehearing en banc (App. 25a) is reported at __ F.3d ___ (Table No. 04-22554)(11th Cir. 2005). The Memorandum Opinion of the United States District Court for the Northern District of Alabama, dated March 15, 2004 is unpublished and is reprinted as Appendix 23a to this Petition.

JURISDICTION

This Court has jurisdiction to review the decision of the United States Court of Appeals for the Eleventh Circuit dated August 9, 2005, pursuant to 28 U.S.C. § 1254(1). The Eleventh Circuit denied the petition for rehearing *en banc* on September 30, 2005. The district court had jurisdiction of this case pursuant to 42 U.S.C. section 1981 and 42 U.S.C. section 2000e (Title VII).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. amend. XIV, § 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 706(k) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-5(k) (2004):

> "In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person."

42 U.S.C. §1988(b):

> "In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title ... the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs ...."

Rule 7 of the Federal Rules of Appellate Procedure:

> "In a civil case, the district court may require an appellant to file a bond or provide other security in any form and amount necessary to ensure payment of costs on appeal."

STATEMENT

At various times, Congress has enacted legislation that deviates from the "American Rule." This fee shifting has the effect of encouraging certain conduct and discouraging other behavior. Additionally, Congress has also, from time to time, deliberately included attorneys' fees in the statutory definition of "costs." However, there is a significant distinction between an award of "costs" including attorneys' fees, which essentially transfers wealth from one party to another and the posting of a bond, including attorneys' fees, which merely provides security in the event attorneys' fees are awarded at the conclusion of the litigation. This case presents the question of whether the district court should be required to conduct the same analysis of anticipated appellate points in order to set the bond as it does in order to award a defendant its attorneys' fees at the conclusion of the trial on the merits.

After successfully defending the Respondents' claims that New Process was a racially hostile work environment, New Process was granted judgment in its favor on October 23, 2003 and awarded costs incurred during trial in the amount of $50,055.51. The trial court then granted New Process's Motion pursuant to Rule 7 of the Federal Rules of Appellate Procedure and set a

cost bond in the amount of $61,000.00 of which $60,000.00 constituted **unrefuted** attorneys' fees on appeal. The trial court correctly noted in its Memorandum Opinion that *Pedraza v. United Guar. Corp.*, 313 F.3d 1323 (11th Cir. 2002) did "not require the court to predict whether or not a defendant will prevail on appeal, or to require that defendant demonstrate that the appeal is frivolous." *Memorandum Opinion*, App. 23a. To require such a finding "would be presumptuous and would be injudicious without reading appellant's brief." *Garrett v. University of Alabama*, 359 F.Supp.2d 1200, 1203 (N.D. Ala. 2005)

Respondents appealed to the Eleventh Circuit Court of Appeals arguing that *Pedraza* should be ignored and, *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978) expanded to require the district court to analyze the merits of the appeal using the same standard as a trial court does when awarding attorneys' fees to a successful defendant. Under the Respondents' theory, this analysis would occur, not at the conclusion of the appeal, but when the bond is **set**, after the notice of appeal is filed, and before the points of appeal are articulated and briefed.

The Court of Appeals struggled with this issue, rendering its first opinion on November 23, 2004, then withdrawing it and issuing a new opinion August 9, 2005. In its original opinion, the Court of Appeals made two significant, and erroneous points. First, it held that the "definition of costs included a prevailing defendant's attorneys' fees only if the plaintiff's action was 'frivolous, unreasonable, or without foundation.'" November 23, 2004 Opinion, App. 21a (emphasis added). Secondly, it also held that it was New Process's burden

to "prov[e] that YSG&P's appeal meets the *Christiansburg/Baker* standard." *Id.* at App. 22a. This holding created an impossibility as the Court did not obligate the plaintiffs to articulate any points of appeal.

Upon reconsideration, the Court of Appeals modified its position. However, the impossibility still existed with the Court's second opinion. Indeed, the Court now asserts that it was not obligated to follow its holding in *Pedraza* and could essentially change its position with respect to what constitutes "costs" under Title VII and the analysis that must be followed to order a bond, which includes attorneys' fees.

The Court of Appeals, ignored the plain language of Rule 7 and impermissibly expanded *Christiansburg* by holding that the district court is required to conduct a *Christiansburg* analysis **prior** to including attorneys' fees in the bond permitted under Rule 7. Additionally, the Court failed to require the losing plaintiff to bring forth even one point of appeal for consideration by the district court. This clearly imposes an impossible burden on a district court to analyze the merits of anticipated appellate points well before the brief in support of the appeal is even filed.

A number of other courts have struggled with the interplay between Rule 29, Rule 7, 28 U.S.C. section 1927 and the various fee-shifting statutes. While some courts recognize that Congress intended, under certain circumstances, to subsume attorneys' fees within the definition of "costs", others have not. The decisions are inconsistent among the Circuits. The Eleventh Circuit has taken the inconsistency one step further by now imposing an additional hurdle for a

prevailing defendant before attorneys' fees can be included in "costs" awarded under the Federal Rules.

Review is urgently needed not only to resolve the conflict among the Circuits, but more importantly to clarify the standard that must be used by trial courts in formulating an amount for a bond under Rule 7 of the Federal Rules of Appellate Procedure.

REASONS FOR GRANTING THE PETITION

THIS COURT SHOULD GRANT REVIEW IN ORDER TO RESOLVE A SPLIT AMONG THE CIRCUITS WITH RESPECT TO THE DEFINITION OF "COSTS" UNDER THE FEDERAL RULES OF APPELLATE PROCEDURE. THIS COURT SHOULD ALSO GRANT REVIEW TO DETERMINE WHETHER, BEFORE AN APPEAL BOND THAT INCLUDES ATTORNEYS' FEES IS GRANTED, A COURT MUST CONDUCT A *CHRISTIANSBURG* ANALYSIS. THE COURT OF APPEAL'S DECISION REWROTE RULE 7 AND 42 U.S.C. 2000e-5(k) BY IMPOSING ON THE PREVAILING DEFENDANT A BURDEN NOT CONTEMPLATED BY CONGRESS. ADDITIONALLY, THIS COURT SHOULD GRANT REVIEW IN ORDER TO PREVENT THE USURPING OF THE JURISDICTION OF THE APPELLATE COURTS BY THE DISTRICT COURT AND THE WASTING OF VALUABLE JUDICIAL RESOURCES.

I. Introduction

The issue before the Court in this Petition will not only resolve a split among the circuits regarding whether attorneys' fees can be included as part of "costs" but also, in the context of civil rights litigation, will also clarify what showing, if any, an unsuccessful plaintiff will have to make when a bond is requested, and the process to be used by the district courts when confronted with a motion to set a bond under Rule 7 of the Federal Rules of Appellate Procedure.

II. Due Process

A party's right to due process and equal protection is fundamental. However, the due process clause of the Fifth Amendment does not establish an absolute right to an appeal. *Adsani v. Miller*, 139 F.3d 67, 76 (2d Cir.) *cert. denied*, 525 U.S. 875 (1998) *citing United States v. MacCollom*, 426 U.S. 317 (1976). Moreover, the Equal Protection Clause of the Fourteenth Amendment also does not guarantee "absolute equality or precisely equal advantages." *Id.* Ignoring these Constitutional tenets, the Eleventh Circuit in issuing its "Solomon-like" opinion, has created an impossibility, which, effectively denies a prevailing defendant its rights to due process. In its opinion, the Court held that **before** a Rule 7 bond, which includes attorneys' fees, could be ordered, the district court, before an single appellate issue is stated, must conduct an analysis of the **appeal** similar to that set forth in *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978).[1] However, the Court of Appeals

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[1]*Christiansburg* was a case brought under Title VII; however, in *Hughes v. Rowe*, 449 U.S. 5, 14 (1980) the Court held the same

imposed no obligation on the Appellant to file any points of error. It was error for the Eleventh Circuit to "reallocate the burdens of litigation" without legislative guidance. *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 247 (1975). The decision of the Court of Appeals violates a prevailing defendant's constitutional rights because its decision sets an impossible hurdle before a defendant can obtain the protections of Rule 7 and a fair adversary proceeding. The decision of the Court of Appeals does not impose a similar burden on the plaintiff who has prevailed at trial. No showing related to the merits of the appeal is required before a bond is assessed against an unsuccessful defendant who chooses to appeal.

The language of Rule 7 is simple; "the district court may require an appellant to file a bond or provide other security in any form and amount necessary to ensure payment of costs on appeal." FED. R. APP. P. 7. When the Rule was revised in 1979, the necessity and amount of the bond was left to the discretion of the trial court. The decision of the Court of Appeals on appeal here removed that discretion.

As noted by this Court in *Marek*, Congress specifically and intentionally included attorneys' fees in the definition of costs in certain fee-shifting statutes. Title VII and 42 U.S.C. section 1988 specifically provide for attorneys' fees as part of costs. The simple language of these sections awards attorneys' fees to the "prevailing party." Rule 7 also does not require any additional showing other than what is plainly stated in

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standard used in Title VII cases should be applied in cases controlled by 42 U.S.C. section 1988.

the statute, nor does it guarantee the appellee any award at the conclusion of the appeal, it is merely an insurance policy. The Court of Appeals re-wrote the statute and removed the court's discretion with respect to the amount of the bond by **requiring** the district court to engage in speculation regarding the merits of the Plaintiff/Appellant's points on appeal before the appellate brief is filed and determine whether the Defendant met its burden before ordering a bond.

The application of *Christiansburg* to Rule 7 by the Court of Appeals in this case was error. Rule 7 does not involve an **award** of attorneys' fees, but rather establishes a fund from which an Appellee may recover attorneys' fees in the event it prevails on appeal. Rule 7 does not contemplate, nor require, any evaluation of the merits of either party's position on appeal. This analysis is more appropriate by the Court of Appeals **after** the merits of the appeal have been determined. By imposing the *Christiansburg* analysis at this point in the proceeding, the Eleventh Circuit has essentially rewritten Rule 7, ignored its own decision in *Pedraza*, expanded this Court's decision in *Christiansburg*, and required the district court initially determine the merits of an unsuccessful plaintiff's appeal.

By imposing one standard for plaintiffs and another standard for defendants, the Eleventh Circuit emasculates the plain language of the Rule and the intent of Congress in drafting the Rule. Moreover, it is not necessary or appropriate to apply different standards when the Rule 7 bond is set. The procedural posture of a case under Rule 7 is significantly different than that faced by a district court under Rule 39 or Rule 68 of the Federal Rules of Appellate Procedure.

Unlike these other Rules, Rule 7 does not involve an **award** to either party and the losing plaintiff's rights will be protected by the proper analysis of the merits of the appeal in the event attorneys' fees are requested at the conclusion of the appeal.

The Eleventh Circuit's holding is an impermissible expansion of this Court's decision in *Christiansburg* and the fee-shifting provisions of the civil rights statutes. Section 1988 is party neutral. This Court changed the neutrality with its decision in *Christiansburg*.

The *Christiansburg* Court expanded the language in 42 U.S.C. section 2000e-5(k) by mandating one standard for an award of attorney's fees to a prevailing plaintiff at the trial court level and another, more onerous standard, for an award of attorney's fees to a prevailing defendant. 434 U.S. at 421. Under *Christiansburg*, in order for a successful defendant to **recover** the attorneys' fees expended during the district court proceeding, it had the burden to establish that the plaintiff's case was "frivolous, unreasonable, or without foundation." *Id.* *Christiansburg* duplicated power already held by the district court. *See Newman v. Piggie Park Ent., Inc.*, 390 U.S. 400, 402 (1968). Now the Eleventh Circuit has taken the pro-plaintiff mentality one step further by holding, without any citation to authority, that a defendant must meet the *Christiansburg* standard before an appellate cost bond that includes attorneys' fees can be ordered. *Young*, 419 F.3d at 1207-08.

The result of this decision is that, before a single point of error is stated, the defendant will be required

to fully brief and argue the appeal to the district court. The plaintiff will have the opportunity to preview his or her appeal and discover all of the countervailing arguments before ordering the record and proceeding with his or her appeal. This scenario severely prejudices the rights of the defendant who has already prevailed in the trial court. The successful defendant will incur significant additional expense attempting to comply with the procedure mandated by the Court of Appeals' decision here. Then, undoubtedly, one or the other party will appeal the district court's decision with respect to its findings in conjunction with its Rule 7 bond order. This process is an incredible waste of judicial resources.

Although the Court of Appeals prevents a defendant from obtaining a bond including attorneys' fees without meeting the *Christiansburg* standard, the Court did not impose on the unsuccessful plaintiff the obligation to present **any** points of error for consideration by the district court. Nor is the plaintiff required to proceed with the appellate points presented to the trial court. Absent that obligation, the district court can never conduct the analysis required before it can include attorneys' fees in a cost bond. Thus, the effect of the Court's opinion is that a successful defendant can **never** have the relief contemplated by Rule 7 of the Federal Rules of Appellate Procedure. This is a denial of a successful defendant's rights to due process.

The Respondents argued in the court below that, without requiring a *Christiansburg* finding, the unsuccessful plaintiff-appellant would be denied his or her rights to due process. They argue that Rule 7 is a

"toll booth" preventing access to justice for the private attorneys' general. However, as unsuccessful plaintiffs, the Respondents no longer occupy the position of the private attorney general or "chosen instrument of Congress." The defendant has already been absolved of the wrongdoing alleged by plaintiffs. Thus, the public policy considerations that operate at the trial court level are not present at the appellate court level.

Moreover, a plaintiff in this situation has another avenue for relief, one not chosen by the plaintiffs here. Federal Rule of Appellate Procedure 24 provides a mechanism for a qualified party to proceed with his appeal without prepayment of fees or costs. A litigant may take an appeal *in forma pauperis* in civil cases, as long as the requirements of the statute are met. The eligibility requirements for leave to appeal *in forma pauperis* are much the same as those at the trial court level. The litigant must file an affidavit of poverty and have a cause of action, which is neither frivolous nor malicious. In accordance with Rule 24, the trial court not only considers the financial wherewithal of the appellant, but also the viability of the proposed statement of issues to be presented on appeal. The trial court must determine whether "there is a factual and legal basis, of constitutional dimension, for the asserted ground." *Sun v. Forrester*, 939 F.2d 924, 925 (11th Cir. 1991) *cert. denied* 503 U.S. 921 (1992). This mechanism gives the defendant some protection against a frivolous appeal; *see id.; Castillo v. Cook County Mail Room Dept.*, 990 F.2d 304 (7th Cir. 1993); yet, keeps the courthouse door open for the worthy appellant. The process allows appeals in instances where an appeal is warranted and the appellant is indigent.

"The statutory purpose [of a motion *in forma pauperis*] for an appeal pursued or defended in good faith is that no litigant shall find the doors of the appellate court barred by reason of his poverty or inability to give security for cost." *Bryan v. Liberty Mut. Ins. Co.*, 418 F.2d 486, 489 (5th Cir. 1969) *cert. denied* 397 U.S. 950 (1970). *Pedraza* does not prevent an impoverished appellant from pursuing his appeal *in forma pauperis*. In fact, Rule 24 is a "logical counterpart" to Rule 7 and was available to the plaintiffs in this case. *Page v. A.H. Robins Co.*, 85 F.R.D. 139 (1980). The plaintiffs in this cause simply chose not to pursue an *in forma pauperis* appeal. Their failure to move to proceed *in forma pauperis* should not operate to prejudice New Process and is no basis to overturn *Pedraza* or the decision of the trial court.

The Court of Appeals has denuded the rights of the successful defendant and ignored this Court's decision in *Alyeska*, 421 U.S. 240. In *Alyeska*, this Court expressly rejected the "private attorney general" argument that the appeals court used to justify awarding attorneys' fees to a prevailing party with no statutory justification. *Id.* at 63. This Court noted that Congress intends to carve out specific exceptions to the American Rule and that

> courts are not free to fashion drastic new rules with respect to the allowance of attorneys' fees to the prevailing party in federal litigation or to pick and choose among plaintiffs and the statutes under which they sue and to award fees in some cases but not in others, depending upon the courts' assessment of the importance of the public policies in particular cases.

Id. at 269. Contrary to *Alyeska*, the Court of Appeals invaded Congress's province and improperly imposed additional requirements into the Rules of Appellate Procedure, but only as applied to successful defendants.

Congress was within its power to require security from the non-prevailing party that included anticipated appellate fees in order to protect the appellee from the loss of additional damages. *Adsani*, 139 F.3d at 77 *citing Cohen v. Beneficial Loan Corp*, 337 U.S. 541, 552 (1949). The fact that the appellate courts may then be closed to some unsuccessful plaintiffs in the process is within the power and discretion of the government. *Id.*

This Court has already recognized that a fair adversary process assumes both a vigorous prosecution and defense and has determined that, by providing for fee-shifting in the context of civil rights litigation, Congress could not have "intended to distort that process by giving the private plaintiff substantial incentives to sue, while foreclosing to the defendant the possibility of ever recoveri[illegible] its expenses." *Christiansburg*, 434 U.S. at 419. The Eleventh Circuit has created a situation so prejudicial to the successful defendant so as to deny its rights to due process.

III. Split Among Circuits

A number of courts have struggled with the interplay between Rule 39, Rule 7, 28 U.S.C. section 1927 and the various fee-shifting statutes. While some courts recognize that Congress intended, in certain circumstances, to subsume attorneys' fees within the definition of "costs," without any clear direction from

this Court, the decisions are inconsistent. The Eleventh Circuit has taken the inconsistency one step further by imposing an additional requirement not found in other decisions before attorneys' fees can be included in "costs" awarded to a successful defendant under the Federal Rules.

Following this Court's holding in *Marek v. Chesny*, 473 U.S. 1 (1985)[2] and relying on the Second Circuit's opinion in *Adsani*, 139 F.3d at 75, the *Pedraza* Court held that, for purposes of a Rule 7 bond, what constituted "costs" was determined by the substantive law giving rise to the claims. *Pedraza*, 313 F.3d at 1333; *see also Baynham v. PMI Mortgage Ins. Co.*, 313 F.3d 1337, 1338 (11th Cir. 2002) (discussing the holding of *Pedraza*). In reaching this conclusion, the *Pedraza* Court noted that by enacting the fee-shifting provisions found in the Civil Rights statutes, Congress exercised its authority to "abrogate the [American] rule in any given circumstance." *Id.* at 1331. The fee-shifting provisions serve two purposes; however, the Eleventh Circuit only focused on the one that benefited the losing plaintiff. Fee-shifting statutes also operate to "protect defendants from burdensome litigation having no legal or factual basis." *Id.* at 1332 *citing Christiansburg*, 434 U.S. at 420. This focus is consistent with the aim of Rule 7, specifically, "to protect the rights of appellees brought into appeals courts by ... appellants [who have no assets in the United States and have failed to 'post a supersedeas bond.]'" *Id.* at 1333. This focus is in addition to the goal of "protect[ing] defendants from the burdens that stem from being forced to defend

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[2] The *Marek* Court acknowledged that Congress has the authority to abrogate the "American Rule."

frivolous lawsuits and to deter plaintiffs from bringing such suits." *Id.*

In addition to *Adsani* and *Marek*, the Sixth Circuit has examined this issue in *In re Cardizem CD Antitrust Litigation*, 391 F.3d 812 (6th Cir. 2004) *cert. denied* __ U.S. __, 125 S.Ct. 2297 (2005). However, in that case, the substantive statute governing the case explicitly granted the trial court discretion to require a party to indemnify its opponent "for any damages incurred, including reasonable attorneys' fees and costs" upon finding that the action was frivolous, without legal or factual merit. *Id.* at 817. The statute did not guide the district court with respect to "costs" in the event the appeal was frivolous. The district court was not required to analyze or make any finding with respect to the points of appeal prior to ordering the bond.

In this case, the Respondents claim to have no assets, but did not file a motion under Rule 24 of the Federal Rules of Appellate Procedure. Nor did they post a supersedeas bond. New Process spent over a million dollars in legal fees defending the spurious claims at the trial court level including a mistrial caused by Plaintiffs and now, without a bond, will have no hope of recovering any of its appellate costs when the trial court's decision is affirmed. New Process is precisely the type of party Rule 7 was enacted to protect. However, the Eleventh Circuit's decision eliminates that protection and imposes an additional financial burden on New Process even before the appeal process begins.

The most recent Seventh Circuit decision examining the issue of whether costs awarded to a prevailing party includes attorneys' fees where a fee shifting statute is *Ekanem v. Health & Hosp. Corp. of Marion Cty, Ind.*, 778 F.2d 1254, 1257 (7th Cir. 1985) ("An award of attorneys' fees under §1988 This decision is a decision distinct from the decision on the merits."). This decision is in line with the Third Circuit and District of Columbia Circuit, but also seems to suggest that the two are distinct issues.

The Third Circuit and the District of Columbia Circuit take a different view from that expressed by the Second, Sixth and Eleventh Circuits, holding attorney's fees are not properly included in an appellate cost bond. *Hirschensohn v. Lawyers Title Ins. Corp*, 118 F.3d 1575 (3rd Cir. (Virgin Islands) 1997); *In re American President Lines, Inc.*, 779 F.2d 714 (D.C. Cir. 1985). Both of these courts have expressly held that the "costs" referred to in Rule 7 are limited to those "costs" enumerated in Rule 39 of the Federal Rules of Appellate Procedure. *Hirschensohn*, 118 F.3d 1575 (3rd Cir. 1997) (1997 WL 307777 at *1); *In re American President Lines, Inc.*, 779 F.2d at 716. These holdings are contrary to the holdings of the *Pedraza* court and the *Adsani* court discussed *supra*.

IV. Usurpation of the prerogative of the Court of Appeals to decide the merits of an appeal.

By instituting the process set out in the opinion, the Eleventh Circuit has effectively permitted the district court to predetermine the merit of the appellate points. *See* FED. R. APP. P. 3, 28. While the trial court may be "familiar with the contours of the case

appealed," the Eleventh Circuit requires the district court to decide the merits of the points of appeal with no obligation imposed upon the plaintiff to bring forward any points of error nor any limit on how many times points of error can be asserted. *See Adsani*, 139 F.3d at 79. By requiring the district court to conduct the *Christiansburg* analysis, the district court will, effectively, issue "advisory" opinions regarding the merit of the points on appeal. Surely this is not a preferred use of our judicial resources.

The court of appeals decision in *In re American President Lines, Inc.* examined whether the district court could include in a Rule 7 bond, any amount other than "taxable costs" as defined by Rule 39. The district court had ordered the bond in an attempt to protect the beleaguered defendant from yet another frivolous appeal at the hands of the overly litigious plaintiff. In reversing the district court's decision, the court of appeals for the District of Columbia circuit held it was the **prerogative of the court of appeals to examine the legitimacy of an appeal.** 779 F.2d at 717 (emphasis added). The Eleventh Circuit in the present case has taken a contrary position and has effectively denied the court of appeals its prerogative. *Young*, 419 F.3d at 1207.

CONCLUSION

The decision of the Eleventh Circuit has created unequal treatment for citizens of this country. Presently, losing plaintiffs in the Eleventh Circuit have no incentive to objectively assess whether they are likely to prevail on appeal before beginning that process. There is no downside for the plaintiffs with

their contingent fee counsel. For even if an appeal is frivolous, unreasonable or without foundation, no recovery will be available for a defendant. The Eleventh Circuit has created the impossible situation of placing the burden on the defendant to prove the plaintiff's appeal lacks merit without a companion burden on the plaintiff to bring forward appellate points. Moreover, it has placed an order of a surety bond on the same footing as an award of fees. Thus, the defendant who has violated no laws and prevailed at trial, will lose again in the form of additional legal fees it will never recoup.

Based on the foregoing, New Process Steel, L.P. respectfully request that the court grant a Writ of Certiorari regarding this matter.

Respectfully Submitted

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No. 04-11554

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JOSEPH YOUNG, DARREL SIMS, MARK STEVEN GREER, MORRIS PICKETT,
Plaintiffs-Appellants,

versus

NEW PROCESS STEEL, LP,
Defendant-Appellee.

August 9, 2005, Decided

August 9, 2005, Filed

COUNSEL: For Young, Joseph, Sims, Darrel, Pickett, Morris, Appellants: Jent, Kevin Wade, Wiggins, Childs, Quinn & Pantazis, Birmingham, AL.

For Greer, Mark Steven, Quinn, C. Michael, Wiggins, Childs, Quinn & Pantazis, Bimingham, AL.

For New Process Steel, LP, Appellee: Long, David Wayne, Greenberg, Traurig, LLP, Atlanta, GA; Gratton, Gaile Pugh, Sirote & Permutt, PC, Birmingham, AL; Richie, Sheldon E., Walters, Katherine J., Richie & Gueringer, P.C., Austin, TX.

JUDGES: Before CARNES and PRYOR, Circuit Judges, and FORRESTER* District Judge.

OPINION BY: CARNES

OPINION: CARNES, Circuit Judge:

This appeal brings us a question of first impression: May a district court require, as a condition for appealing a judgment, that a losing plaintiff in a civil rights case post a Fed. R. App. P. 7 bond that includes the defendant's anticipated appellate attorney's fees? The front line position of the appellants in this case, plaintiffs who lost their Title VII and 42 U.S.C. § 1981 lawsuit, is that the district court cannot order them to post such a bond, regardless. Their fall back position is that the court cannot do it without making a finding consistent with *Christiansburg Garment Co. v. Equal Employment Opportunity Comm'n*, 434 U.S. 412, 98 S. Ct. 694, 54 L. Ed. 2d 648 (1978), that the would-be appeal is frivolous, unreasonable, or groundless. Although we reject the plaintiffs' primary position, we do find merit in their secondary one.

I.

In May 2001 Joseph Young, Darrel Sims, Mark Greer, and Morris Pickett filed a lawsuit against their employer, New Process Steel, L. P., pursuant to 42 U.S.C. § 1981 and Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. §§ 2000e *et. seq.* Their complaint alleged various forms of racial discrimination, including a racially hostile work environment and various adverse employment actions. Young sued under Title VII and § 1981, while the other plaintiffs sued only under § 1981. New Process Steel moved to dismiss Young's Title VII claims and, alternatively, moved for partial summary judgment on those claims. In response, Young moved to amend his complaint to bring all of his claims under § 1981. The court granted

both Young's motion to amend and New Process Steel's motion to either dismiss or grant summary judgment against Young's Title VII claims.

In July 2002 Greer filed a new lawsuit alleging that he had been fired by New Process Steel after the original action was filed and that the firing was retaliatory. The new lawsuit was consolidated with the original one. Meanwhile the plaintiffs' attorney informed New Process Steel that the plaintiffs planned to pursue only their hostile work environment claims. In response, New Process Steel filed, pursuant to Fed. R. Civ. P. 41, an unopposed motion to dismiss all of the plaintiffs' other claims, the ones alleging racial discrimination regarding overtime and promotions. The court granted that motion and dismissed with prejudice all of those other claims, leaving for trial only the racially hostile work environment claims and Greer's retaliation claim.

The first trial of those remaining claims ended in a mistrial in June of 2003, which was granted on motion of the defendant, which was apparently made as a result of some comments by the plaintiffs or their attorneys to the jurors. Thereafter, on Greer's own motion his retaliation claim was dismissed, leaving for the second trial only the plaintiffs' hostile work environment claims. That trial ended in a jury verdict and final judgment for the defendant in October 2003. The four plaintiffs filed their notice of appeal from that judgment on November 21, 2003 .

On February 5, 2004, the district court, without prodding from the defendant, entered an order stating:

Pursuant to Rule 7, Federal Rule of Appellate Procedure, this court would require appellant to file a bond or provide other security in an amount necessary to ensure payment of costs on appeal if the potential costs taxable on appeal can be fairly approximated. If appellee wishes to invoke Rule 7, it shall within fourteen (14) days submit evidentiary materials to support the fixing of a bond amount.

Being able to take a hint when hit over the head with one, the defendant responded by filing a motion that asked the court to require the plaintiffs to post a bond. The defendant sought to have the bond cover its anticipated appellate attorney's fees as well as the other costs it would incur as a result of the appeal. The motion was accompanied by affidavits estimating the amount of those attorney's fees. In granting the motion in its entirety, the district court relied on *Pedraza v. United Guar. Corp.*, 313 F.3d 1323 (11th Cir. 2002), which it called "potent medicine." The order the court entered required the plaintiffs to post a cost bond in the amount of $61,000 as a prerequisite to their appeal. All but $1,000 of that amount was to cover the attorney's fees the defendant estimated it would incur in the appeal.

The defendant's motion did not allege, and the court's order did not pretend to find, that the plaintiffs' appeal would be frivolous, unreasonable, or groundless. Instead, the court expressly disavowed the need for a finding of that nature. In a memorandum opinion accompanying its order, the court stated: "The fixing of a Rule 7 bond, pursuant to *Pedraza v. United Guaranty Corp.*, 313 F.3d 1323 (11th Cir. 2002), does not require the court to predict whether or not a defendant will

prevail on appeal, or to require that defendant demonstrate that the appeal is frivolous."

The plaintiffs appealed the district court's imposition of the Rule 7 bond. See *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546-47, 69 S. Ct. 1221, 1225-26, 93 L. Ed. 1528 (1949) (a district court's order requiring one party to post security prior to appealing is a final appealable order). Their putative appeal on the merits was stayed pending the appeal of the bond issue. Without hearing oral argument, a panel of this Court issued a decision vacating the district court's order requiring the bond and remanding with instructions that the court not include the defendant's anticipated appellate attorney's fees in the Rule 7 bond absent a finding that the plaintiff's appeal would be frivolous, unreasonable, or groundless. *Young v. New Process Steel, L.P.*, 125 Fed. Appx. 977 (11th Cir. 2004) (per curiam). The defendant filed a petition for rehearing *en banc*. In response, the original panel vacated its earlier opinion and set the case for rehearing before an oral argument panel of the Court. We are the new panel and have heard oral argument on the issue.

II.

While this Court generally reviews a district court's imposition of a Rule 7 cost bond only for abuse of discretion, *Pedraza*, 313 F.3d at 1328, that limited standard does not mean much in this case, which turns on a pure law issue involving the interpretation of Rule 7. We decide pure law issues *de novo*, *id.*, which is another way of saying that a ruling based on an error of law is an abuse of discretion. *Koon v. United States*, 518 U.S. 81, 100, 116 S. Ct. 2035, 2047, 135 L. Ed. 2d 392

(1996) ("A district court by definition abuses its discretion when it makes an error of law."); *United States v. Brown*, 332 F.3d 1341, 1343 (11th Cir. 2003) (same); *United States v. Hall*, 349 F.3d 1320, 1323 (11th Cir. 2003) (an error of law "is by definition an abuse of discretion").

Rule 7 has two sentences, but only the first one has any relevance to the issue before us. That sentence provides: "In a civil case, the district court may require an appellant to file a bond or provide other security in any form and amount necessary to ensure payment of costs on appeal." Fed. R. App. P. 7. The rule does not define "costs" for its purposes, but this Court went a long way toward doing so, at least for cases where a fee-shifting statute is involved, in our Pedraza decision. There we explained that the word "costs" for Rule 7 purposes should draw its meaning from the fee-shifting statute applicable to the underlying case. *Pedraza*, 313 F.3d at 1333.

Pedraza was a case arising under 12 U.S.C. § 2607(a) of the Real Estate Settlement Procedures Act, and the applicable fee-shifting provision in that statute stated that "the court may award to the prevailing party the court costs of the action together with reasonable attorney's fees." 12 U.S.C. § 2607(d)(5) (emphasis added). We explained that the words "together with" meant that attorney's fees were recoverable in addition to costs, not as part of costs. *Pedraza*, 313 F.3d at 1333-34. For that reason, we concluded that in a RESPA case the district court could not order appellants to post a Rule 7 bond that included anticipated appellate attorney's fees. *Id.* at 1334-35. It could not, because the fee-shifting statute applicable to the underlying

RESPA lawsuit, 12 U.S.C. § 2607(d)(5), did not include attorney's fees in its definition of "costs," 313 F.3d at 1334-35, and Rule 7 does not authorize courts to require a bond in an amount larger than "costs" as defined in the applicable fee-shifting statute.

We said more in *Pedraza*, and the more we said has direct relevance to this case. Explicating our holding in *Pedraza* by giving an example of its converse, we stated that a district court could order a losing plaintiff to post a Rule 7 bond that included anticipated appellate attorney's fees if 42 U.S.C. § 1988 were the underlying fee-shifting statute. See 313 F.3d at 1333-35. That's because § 1988 expressly allows the court to award the prevailing party "a reasonable attorney's fee *as part of* the costs." 42 U.S.C. § 1988(b) (emphasis added). Thus, where § 1988 is the applicable fee-shifting statute, "costs" includes anticipated appellate attorney's fees. In our present case, of course, § 1988 is the provision that governs fee-shifting, as it will in civil rights cases generally.

Of course, the statement in *Pedraza* about what should be done in a case where § 1988 is the fee-shifting source is probably dictum, because that case was not before this Court then. See *Watts v. BellSouth Telecomm., Inc.*, 316 F.3d 1203, 1207 (11th Cir. 2003); *United States v. Aguillard*, 217 F.3d 1319, 1321 (11th Cir. 2000) (per curiam). We are not bound to follow dictum, but do accord it any respect it earns through its persuasive value. *See New Port Largo, Inc. v. Monroe County*, 985 F.2d 1488, 1500 n. 7 (11th Cir. 1993) (Edmondson, J., specially concurring). The statement in Pedraza about § 1988 is not incidental or oh-by-the-way dictum, but instead illustrates the nature and extent of the rule that

was actually used to decide the case. For that reason, we are persuaded to give the statement more respect than we might afford dicta that was not as closely intertwined with the reasoning and result of the decision containing it. *See Local 28 of Sheet Metal Workers' Int'l Ass'n v. Equal Employment Opportunity Comm'n*, 478 U.S. 421, 490, 106 S. Ct. 3019, 3057, 92 L. Ed. 2d 344 (1986) (O'Connor, J., concurring in part and dissenting in part) ("Although technically dicta, ... an important part of the Court's rationale for the result it reached ... is entitled to greater weight ...."). Even though not required to adhere to *Pedraza's* statement that Rule 7 permits inclusion of a defendant's appellate attorney's fees as part of a cost bond where § 1988 applies, we nonetheless choose to follow it. The statement makes sense, and it expresses a conclusion compelled by the reasoning that led the Court to reach the result it did in *Pedraza*.

The plaintiffs contend that *Pedraza's* statement about the proper interpretation of Rule 7 where § 1988 applies, which is to say in civil rights cases, is wrong. The statement is wrong, they say, because it is inconsistent with that provision's pronounced plaintiff preference. Although the language of § 1988 is itself party-neutral, the Supreme Court held in *Christiansburg* that while "a prevailing [civil rights] plaintiff ordinarily is to be awarded attorney's fees in all but special circumstances," *Christiansburg*, 434 U.S. at 417, 98 S. Ct. at 698 (emphasis omitted), a district court should not award attorney's fees to a prevailing civil rights defendant absent "a finding that the plaintiff's action was frivolous, unreasonable, or without foundation," *id.* at 421, 98 S. Ct. at 700.

The plaintiffs in this case ask us to carry over *Christiansburg's* pro-plaintiff interpretation of the fee-shifting provision of § 1988 into Rule 7's appellate bond provision. Actually, that is their back up position. Their primary position asks us to slant Rule 7 even further toward plaintiffs than *Christiansburg* slanted § 1988. What they primarily want us to do is hold that attorney's fees can never be included in the bond an appealing plaintiff can be required to post in a case covered by § 1988, not even where the appeal is going to be frivolous, unreasonable, or without foundation.

The *Christiansburg* decision argues against the absolutist position the plaintiffs advocate. The Supreme Court did not hold in *Christiansburg* that attorney's fees could never be awarded to prevailing defendants; it only restricted the circumstances in which that could happen. We can faithfully follow the *Christiansburg* decision by holding that the same restrictions applied by it to the award of attorney's fees under § 1988 also apply to the inclusion of attorney's fees in a Rule 7 cost bond. Rule 7's language makes no distinction between plaintiffs and defendants ("may require an appellant to file a bond"), just as the fee-shifting provisions of § 1988 do not ("may allow the prevailing party ...a reasonable attorney's fee").

And the same policy reasons are at play in both contexts. The reason that attorney's fees are awarded to successful plaintiffs as a matter of course where § 1988 applies is that in civil rights cases plaintiffs are "the chosen instrument of Congress." *Christiansburg*, 434 U.S. at 418, 98 S. Ct. at 699. Congress has decided to implement its civil rights laws by effectively deputizing individuals to act as "private attorney

general[s]" while they pursue their own interests as plaintiffs. *Newman v. Piggie Park Enter., Inc.*, 390 U.S. 400, 402, 88 S. Ct. 964, 966, 19 L. Ed. 2d 1263 (1968). Reimbursing successful plaintiffs for the cost of their attorneys out of the losing defendants' pockets serves a dual function: it provides an incentive for bringing the lawsuits, and it adds to the costs of those who violate the civil rights of others. *Id.*; *Christiansburg*, 434 U.S. at 418-19, 98 S. Ct. at 699.

By contrast, a victorious defendant in a civil rights action is not the "chosen instrument of Congress," few defendants need any incentive to defend themselves when sued, and a losing plaintiff in a civil rights case has not been found to have violated anyone's civil rights. Hence the rule announced in *Christiansburg* that defendants who win civil rights lawsuits generally cannot recover their attorney's fees from plaintiffs. To that general rule, however, the Supreme Court in *Christiansburg* also announced an exception: A court may award attorney's fees under § 1988 to a prevailing defendant where the court finds that "the plaintiff's action was frivolous, unreasonable, or without foundation." *Christiansburg*, 434 U.S. at 421, 98 S. Ct. at 700. This exception, the Supreme Court explained, is appropriate because "while Congress wanted to clear the way for suits to be brought under the [underlying civil rights] Act, it also wanted to protect defendants from burdensome litigation having no legal or factual basis." *Id.* at 420, 98 S. Ct. at 700. Put a little differently, requiring plaintiffs to pay the defendant's attorney's fees where there clearly was no good reason to bring the lawsuit discourages groundless lawsuits, which is a good thing in the civil rights area as in others.

The *Christiansburg* rule applies not only to trials in civil rights cases, but also to appeals by plaintiffs in them. Because a heavy majority of judgments are affirmed on appeal, most appeals by plaintiffs in civil rights cases do not ultimately result in righting a wrong under the civil rights acts. But some do. And when they do, the plaintiffs are awarded attorney's fees for the appellate part of their effort as well as for the trial part. *See Lattimore v. Oman Constr.*, 868 F.2d 437, 440 & n. 6 (11th Cir. 1989) (affirming the district court's grant of appellate attorney's fees to a prevailing civil rights plaintiff), abrogated on other grounds by *City of Burlington v. Dague*, 505 U.S. 557, 112 S. Ct. 2638, 120 L. Ed. 2d 449 (1992). Likewise, when a plaintiff who was unsuccessful at trial fares no better on appeal, the plaintiff is not assessed the appellate attorney's fees of the defendant unless the appeal was frivolous, unreasonable, or without foundation. *See Bugg v. Int'l Union of Allied Indus. Workers of Am., Local 507*, 674 F.2d 595, 599-601 (7th Cir. 1982).

Applying the reasoning of the *Christiansburg* decision to the Rule 7 context, a general rule requiring a losing plaintiff in a civil rights case to post a bond that includes the defendant's attorney's fees on appeal would discourage and might prevent some appeals for which there is a good basis. As a result, individuals would be prevented from acting as private attorneys general to pursue through the appellate process the enforcement of the civil rights acts.[1] That would be bad policy at the appellate stage of the process for the same reasons it is at the trial stage.

By the same token, however, a plaintiff who is unsuccessful in a civil rights suit at trial should not be

freed from the burden of an appellate bond that includes anticipated attorney's fees where the appeal is likely to be frivolous, unreasonable, or without foundation. On appeal, as at trial, applying full cost disincentives in those circumstances is consistent with the intent of Congress "to protect defendants from burdensome litigation having no legal or factual basis." *Christiansburg*, 434 U.S. at 420, 98 S. Ct. at 700.

While happy to have *Christiansburg's* general rule imported into the Rule 7 area, the plaintiffs want us to clip from that rule the exception for frivolous appeals. They argue that in this context the *Christiansburg* exception is unnecessary and impractical. It is unnecessary to discourage frivolous appeals in civil rights cases, they say, because Fed. R. App. P. 38 already serves that function in all cases. Rule 38 does allow an appellate court, after motion from the appellee or after issuing its own notice, to order the appellant to pay damages and single or double costs for a frivolous appeal. Nonetheless, the argument that Rule 38 obviates the necessity for the *Christiansburg* exception at the appellate level does not measure well against experience or logic.

Experience has shown that because most appellees just want to be rid of the annoyance of a baseless appeal with as little additional fuss as possible, the trickle of Rule 38 motions does not nearly approximate the flood of frivolous appeals. And given all of the demands on the time of appellate courts, few Rule 38 notices issue without a motion. These forces combine to make Rule 38 a toothless tiger in most instances. Not only that, but logically it is better to prevent frivolous appeals than to punish those who bring them after the case has taken

the time of the appellate court. We expect that at least some baseless appeals will be stopped at the Rule 7 stage, sooner rather than later in the process and with greater savings in time and effort.

The plaintiffs' impracticality argument against recognizing the *Christiansburg* exception in the Rule 7 context posits that it will be "extremely difficult" for a district court to determine prospectively whether an appeal is going to be frivolous, unreasonable, or without foundation. District courts, however, have a great deal of experience weighing the merits of potential appeals. In every one of the thousands of proceedings in which a state prisoner denied 28 U.S.C. § 2254 relief or a federal prisoner denied 28 U.S.C. § 2255 relief seeks to appeal, the district court that denied relief must determine whether there is likely to be enough substance to an appeal for one to be allowed. See Fed. R. App. P. 22(b)(1) ("In a habeas corpus proceeding ... if an applicant files a notice of appeal, the district judge who rendered the judgment must either issue a certificate of appealability or state why a certificate should not issue.").

In deciding whether to allow an appeal from the denial of § 2254 or § 2255 relief to proceed, the district court must decide if the petitioner "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Where the court has held that a procedural bar to relief exists, it must also decide if the prisoner has made a substantial showing that the procedural ruling was wrong. *See Slack v. McDaniel*, 529 U.S. 473, 483-84, 120 S. Ct. 1595, 1603-04, 146 L. Ed. 2d 542 (2000). These determinations, which district courts routinely make in order to decide whether the

denial of § 2254 or § 2255 relief can be appealed, are not perfectly analogous to the determination they must make in order to decide whether a judgment denying relief in a civil rights case can be appealed. Deciding whether a "substantial showing" has been made is not the same thing as determining whether an appeal will be frivolous, unreasonable, or without foundation. But both tasks essentially involve evaluating a plaintiff's possibility of success on appeal based on what the court has seen of his case at the trial level. That is enough of a similarity to convince us that district courts will be able to assess prospectively appeals from the denial of relief in a civil rights case under a scale heavily tilted in favor of the plaintiff who wants to appeal.

In summary, reading Rule 7 against the *Christiansburg* decision, we hold that a district court may not require an unsuccessful plaintiff in a civil rights case to post an appellate bond that includes not only ordinary costs but also the defendant's anticipated attorney's fees on appeal, unless the court determines that the appeal is likely to be frivolous, unreasonable, or without foundation. If the court does make that determination, it has discretion to grant the defendant's motion and require the plaintiff to post a bond in the amount of the defendant's anticipated costs including appellate attorney's fees.

But it need not do so. Because Rule 7 states the authority it gives in terms of "may," the district court may decide not to require an appeal bond or to require one that does not include the amount of the defendant's anticipated attorney's fees on appeal. *See Fed. Prescription Serv., Inc. v. Am. Pharm. Ass'n*, 205 U.S. App. D.C. 47, 636 F.2d 755, 757 n. 2 (D. C. Cir. 1980)

("The new Rule 7, effective August 1979, leaves the requirement of an appeal bond to the district court's discretion ....We cannot dismiss American's appeal for failure to post a bond the district court chose not to require."); *Pan Am. Grain Mfg. Co. v. P.R. Ports Auth.*, 193 F.R.D. 26, 43 (D. P.R. 2000) ("Rule 7 leaves to the discretion of the district court in a civil case whether to require the filing of a bond for costs on appeal."); *Lundy v. Union Carbide Corp.*, 598 F. Supp. 451, 452 (D. Or. 1984) ("The requirement of an appeal bond under Appellate Rule 7 is left to the discretion of the district court.").

Of course, the fact that a plaintiff in a civil rights case is required to post a Rule 7 bond that includes anticipated appellate attorney's fees does not mean the plaintiff will be required to pay attorney's fees if the judgment is affirmed on appeal. This Court will award a defendant who succeeds in preserving a judgment against a plaintiff in a civil rights case attorney's fees only if we find that the plaintiff's appeal turned out to be frivolous, unreasonable, or without foundation within the meaning of the *Christiansburg* decision.

We REVERSE the district court's order imposing a Rule 7 bond in the amount of $ 61,000, and REMAND the case for further proceedings consistent with this opinion.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

[1] We are not persuaded by the defendant's assurance that if a plaintiff in a civil rights case cannot afford to post a bond that includes the defendant's anticipated attorney's fees on appeal, the plaintiff can always move

to proceed in forma pauperis. *See* Fed. R. App. P. 24. The plaintiffs insist there is a gap between qualifying for in forma pauperis status and being able to post a large bond, and that they fall in it. We need not decide if there are some plaintiffs who are too poor to post a bond but too affluent to qualify for IFP status. *Cf. Page v. A.H. Robins Co.*, 85 F.R.D. 139, 140 (E. D. Va. 1980) ("A logical counterpart to Appellate Rule 7 is Appellate Rule 24, which pertains to appeals in forma pauperis."). We need not decide that because even for plaintiffs who can afford to post appeal bonds, the larger the bond amount, the higher the cost of appealing; and the higher the cost of appealing, the greater the disincentive for doing so.

No. 04-11554

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JOSEPH YOUNG, DARREL SIMS, MARK STEVEN GREER, MORRIS PICKETT,
Plaintiffs-Appellants,

versus

NEW PROCESS STEEL, LP,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Alabama

(NOVEMBER 23, 2004)

Before BIRCH, CARNES and PRYOR, Circuit Judges. PER CURIAM:

Joseph Young, Darnel Sims, Mark Green, and Morris Pickett ("YSG&P") appeal the order of the district court requiring them to post an appellate cost bond that includes expected attorneys' fees, pursuant to Federal Rule of Appellate Procedure 7, in order to appeal the jury verdict in an action they filed pursuant to 42 U.S.C. § 1981. Because we find the district court erred in failing to determine whether their appeal was frivolous, unreasonable, or without foundation before imposing the bond, we VACATE the court's order and REMAND for further proceedings consistent with this opinion.

I. BACKGROUND

YSG&P filed a 42 U.S.C. § 1981 action against New Process Steel, L.P. ("New Process") and alleged racial discrimination in the workplace. A jury found in favor of New Process. The district court awarded New Process costs, including attorneys' fees, of $50,055.51. YSG&P moved for a renewed judgment as a matter of law, or, in the alternative, for a new trial. The district court denied these motions, and YSG&P timely appealed.

Soon after, the district court sua sponte issued an order stating that:

> Pursuant to Rule 7, Federal Rules of Appellate Procedure, this court would require appellant to file a bond or provide other security in an amount necessary to ensure payment of costs on appeal if the potential costs taxable on appeal can be fairly approximated. If appellee wishes to invoke Rule 7, it shall within fourteen (14) days submit evidentiary materials to support fixing the bond amount.

R11-294 at 1. In response, New Process requested that the court invoke Rule 7 and argued that its appellate costs and attorneys' fees would total at least $60,000. After hearing oral arguments, the district court entered a memorandum opinion and order requiring YSG&P to post an appellate bond of $1,000 in expenses and $60,000 in expected attorney's fees, or $61,000 in total, in order to proceed with their appeal. The court noted that *Pedraza v. United Guaranty Corp.*, 313 F. 3d 1323 (11th Cir. 2002) "does not require the court to predict whether or not a defendant will prevail on appeal, or to

require that defendant demonstrate that the appeal is frivolous" in imposing an appellate cost bond pursuant to Rule 7. R11-302 at 1. YSG&P timely appealed the district court's order.

On appeal, YSG&P argue that the district court erred in applying *Pedraza* to their appeal. Imposing an appellate bond which includes expected attorneys' fees, they contend, prevents them from prosecuting the appeal and thereby frustrates Congress's goal of "ensuring that civil rights plaintiffs obtain effective access to the judicial process." *Marek v. Chesny*, 473 U.S. 1, 10, 105 S.Ct. 3012, 3017 (citation omitted). In the alternative, they argue that the district court erred in failing to determine whether their appeal was "frivolous, unreasonable, or groundless," pursuant to *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422, 98 S.Ct. 694, 701 (1978), before including expected attorneys' fees in the amount of the bond.

II. DISCUSSION

Although the district court's imposition of a cost bond under Rule 7 is reviewed for abuse of discretion, its interpretation of Rule 7, including the definition of "costs," is reviewed *de novo*. *See Pedraza*, 313 F.3d at 1328. Rule 7 allows a district court to "require an appellant to file a bond or provide other security in any form and amount necessary to ensure payment of costs on appeal." Rule 7. In *Pedraza*, we held that a cost bond imposed under the Rule may include attorneys' fees if the statutory fee shifting provision attending the plaintiffs underlying cause of action defines "costs" to include such fees. 313 F.3d at 1333. To determine the definition of "costs" in the underlying fee shifting

provision, we analyze the plain language of the provision as well as the policies behind its enactment. *Id.* at 1132-34 (analyzing the language of and policy behind the fee shifting provision at issue); *see also Marek*, 473 U.S. at 10, 105 S.Ct. at 3017 (importing the plain meaning of a fee shifting statute to another context only after ensuring that the congressional policies underlying the statute were not violated).

YSG&P note that *Pedraza* does not implicate the public policy concerns present in their civil rights litigation, and they argue that the district court's application of *Pedraza* to their appeal thus undermines Congress's reliance on private litigants to enforce the civil rights laws. *Pedraza* involved the costs awardable on an appeal of an action based on the Real Estate Settlement Procedures Act of 1974 ("RESPA"), 12 U.S.C. § 2607(a), and only addressed § 1988 in dicta. 313 F.3d at 1333. Nevertheless, in holding that the definition of "costs" for Rule 7 purposes should be derived from the statutory fee shifting provision that attends a plaintiff's underlying cause of action, we recognized that Congress has the power to require unsuccessful litigants to pay other parties' attorneys' fees "in any given circumstance," including in civil rights cases. *See id.* at 1331. As such, we believe *Pedraza* can be applied here.

Although *Pedraza* mandates that attorneys' fees **may** be included in an appellate cost bond imposed in civil rights litigation, we must still address whether the district court properly included them in the bond it imposed. The applicable fee-shifting provision, 42 U.S.C. § 1988(b) (2003), provides: "[i]n any action or proceeding to enforce a provision of... [section 1981], the

court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee **as part of the costs**. . . . " 42 U.S.C. § 1988(b) (emphasis added). However, due to the unique policies underlying § 1988(b) and the civil rights laws generally, plaintiffs should not be assessed prevailing defendants' attorneys' fees unless a court finds that their claim was "frivolous, unreasonable, or without foundation." *Baker v. Alderman*, 158 F.3d 516, 524-25 (11th Cir. 1998) (citation omitted). Unlike a losing defendant, a losing plaintiff who brought civil rights litigation is "the chosen instrument of Congress" and is not "a violator of federal law." *Christiansburg Garment*, 434 U.S. at 418, 98 S.Ct. at 699.

The language of § 1988(b) "plainly encompasses attorneys' fees **within** the universe of awardable costs" under Rule 7, *Pedraza*, 313 F.3d at 1334; however, we define "costs" as used in § 1988(b) to include a prevailing defendant's attorneys' fees only if the plaintiff s action was "frivolous, unreasonable, or without foundation." *Baker*, 158 F.3d at 524-25 (citation omitted). As such, the district court erred in refusing to determine whether YSG&P's appeal was frivolous, unreasonable, or without foundation before imposing the bond. *See Pedraza*, 313 F.3d at 1333.[1]

III. CONCLUSION

Accordingly, we VACATE the court's order and REMAND for further proceedings consistent with this opinion.

Footnote

[1]New Process argues that YSG&P waived their right to

appeal the district court's Rule 7 order by failing to file a motion under Federal Rule of Appellate Procedure 24 to proceed **in forma pauperis**. Because our ruling hinges on the meaning of "costs" in 42 U.S.C. § 1988(b), and not on YSG&P's ability to pay the cost bond imposed pursuant to Rule 7, we reject this argument.

We also reject New Process's contention that YSG&P waived their right to appeal the order because they did not present the basis of their appeal of the judgment to the district court and ask for a specific finding as to its reasonableness. While an appellate court may decline to hear an issue if it was not first presented to the district court, *Walton v. Johnson & Johnson Servs., Inc.*, 347 F.3d 1272, 1282 (11th Cir. 2003), YSG&P did argue before the district court that a cost bond could not be imposed pursuant to Rule 7 without a finding, under *Christiansburg Garment Co.*, 434 U.S. at 422, 98 S.Ct. at 701, that their appeal was frivolous, unreasonable, or groundless. The district court explicitly refused to make this finding. Further, New Process, not YSG&P, bears the burden of proving that YSG&P's appeal meets the *Christiansburg / Baker* standard. *See Foster v. Barilow*, 6 F.3d 405, 409 (6th Cir.1993).

CIVIL ACTION NO. 01-AR-1151-S 02-AR-1739-S

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

JOSEPH YOUNG, et al., Plaintiffs,

v.

NEW PROCESS STEEL, L.P., Defendant.

Entered 3/15/04

MEMORANDUM OPINION

Defendant, New Process Steel, L.P., is incorrect insofar as it seeks the inclusion of the costs taxed against plaintiffs in the trial court as part of the bond to be posted by the plaintiffs-appellees in accordance with Rule 7, F. R. App. P. However, plaintiffs have not offered any evidence to refute defendant's claim that a reasonable anticipated attorney's fee for defending the appeal would be $60,000.00 a figure which the court agrees is reasonable. The fixing of a Rule 7 bond, pursuant to *Pedranza v. United Guaranty Corp.*, 313 F. 3d 1323 (11th Cir. 2002), does not require the court to predict whether or not a defendant will prevail on appeal, or to require that defendant demonstrate that the appeal is frivolous. Accordingly, by separate order, plaintiffs will be required to post a Rule 7 bond in the amount of $61,000.00, comprised of $1,000 in expenses and $60,000 in attorney's fees.

DONE this 15th day of March, 2004.

WILLIAM M. ACKER, JR.
UNITED STATES DISTRICT JUDGE,

No. 04-11554
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JOSEPH YOUNG, DARREL SIMS, MARK STEVEN GREER, MORRIS PICKETT,
Plaintiffs-Appellants,

versus

NEW PROCESS STEEL, LP,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Alabama

Before: CARNES and PRYOR, Circuit Judges, and FORRESTER*, District Judge.
PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT: /s/ Ed Carnes
UNITED STATES CIRCUIT JUDGE

*Honorable J. Owen Forrester, United States District Judge for the Northern District of Georgia, sitting by designation.